

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JACK MACKIE,

Plaintiff,

v.

MICHAEL J. HIPPLE,

Defendant.

No. C09-0164RSL

ORDER DENYING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before the Court on defendant's motion for summary judgment (Dkt. # 50). Having considered the submissions of the parties, the Court DENIES defendant's motion.¹

II. DISCUSSION

A. Factual Background

The following facts are undisputed for the purposes of this motion. See Reply at 3 ("For purposes of summary judgment, the Court must accept Mackie's version . . ."). Plaintiff brings an action for the infringement of his copyright in a portion of a pictorial and sculptural work entitled "Dance Steps on Broadway," which he co-authored in 1979. The work consists of

¹ The Court did not consider plaintiff's surreply for the purposes of this motion and discourages plaintiff from filing similar submissions in the future.

1 8 installations (“sub-installations”) set into the public sidewalks of Broadway Avenue in Seattle,
2 Washington that fancifully depict various dance sequences through the use of bronze shoe-prints
3 and arrow diagrams. Each sub-installation has its own title block listing the title of the dance
4 depicted and a copyright notice. “Dance Steps on Broadway” was registered with the Register
5 of Copyrights as of October 13, 1998. A copy of the certificate of registration is attached to the
6 complaint.

7 Also attached to the complaint is defendant’s allegedly infringing work, a photograph of a
8 portion of the “Dance Steps on Broadway” sub-installation that depicts the Mambo. The
9 photograph is taken from the perspective of a pedestrian and shows only a portion of the sub-
10 installation. There are two actual feet in the upper-left corner of the photograph covering two of
11 the bronze footprints, apparently in the process of performing the dance. The photograph is
12 cropped so that the original’s copyright notice is not visible. Defendant Hipple took this
13 photograph in 1997. Hipple licensed the photograph to former co-defendant Age Fotostock
14 America., Inc. (“Fotostock”) in 2000. Fotostock thereafter displayed Hipple’s photograph on its
15 website. In June 2003, Fotostock sold a copy of the photograph for \$60. Hipple received a \$30
16 commission for the sale. Fotostock has since settled with plaintiff and Hipple is the sole
17 remaining defendant.

18 Mackie first had knowledge of Hipple’s alleged infringement in August 2007 when he
19 was alerted that Hipple’s photograph was available online. On February 19, 2008, Mackie’s
20 attorney wrote Hipple and Fotostock alleging infringement. Mackie filed a complaint on
21 February 5, 2009. From 1999 until now, Mackie has asserted several claims against alleged
22 infringers, but has only brought one other claim to court. Hipple asserts that Mackie discovered
23 some of these alleged infringers by searching the Internet. See Motion at 3.

24 **B. Summary Judgment**

25 Summary judgment is appropriate only "if the pleadings, the discovery and disclosure
26 materials on file, and any affidavits show that there is no genuine issue as to any material fact

1 and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party
 2 moving for summary judgment has the burden of showing the absence of a genuine issue of
 3 material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). "[S]ummary
 4 judgment should be granted where the nonmoving party fails to offer evidence from which a
 5 reasonable jury could return a verdict in its favor," Triton Energy Corp. v. Square D Co., 68 F.3d
 6 1216, 1221 (9th Cir. 1995), or where there is a "complete failure of proof concerning an essential
 7 element of the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).
 8 The Court must view the evidence and draw all reasonable inferences therefrom in the light most
 9 favorable to the nonmoving party. U.S. v. Johnson Controls, Inc., 457 F.3d 1009, 1013 (9th Cir.
 10 2006). However, "the mere existence of a scintilla of evidence in support of the non-moving
 11 party's position is not sufficient." Triton, 68 F.3d at 1221.

12 **C. Analysis**

13 Hipple argues that he is entitled to summary judgment because Mackie's suit is barred by
 14 the Copyright Act's statute of limitations. 17 U.S.C. § 507(b) provides that "[n]o civil action
 15 shall be maintained under the provisions of this title unless it is commenced within three years
 16 after the claim accrued." The Ninth Circuit, following the "discovery rule" adopted by the
 17 majority of circuits, interprets § 507(b) so that a claim for copyright infringement accrues "when
 18 one has knowledge of a violation or is chargeable with such knowledge." Roley v. New World
 19 Pictures, Ltd., 19 F.3d 479, 481 (9th Cir. 1994). Under the discovery rule, a plaintiff is
 20 chargeable with knowledge when a reasonable person would have discovered the infringement.
 21 See, e.g., Warren Freedensfeld Associates, Inc. v. McTigue, 531 F.3d 38, 44 (1st Cir. 2008).

22 Hipple argues that a reasonable person "would at least [have] tried to search on Google or
 23 stock photography agencies' websites beginning in the year 2000" and that "[r]easonable
 24 diligence required Mackie to periodically search the Internet to discover what was there to be
 25 discovered." Reply at 2. Hipple admits, however that he "cannot prove that Mackie would have
 26 found Hipple's photograph through a general search" Reply at 2. Moreover, Hipple

1 presents no case law indicating that Mackie had an affirmative duty to police the internet and
2 stock photography agencies to find infringing copies of his work. The copyright case cited by
3 Hipple for the proposition that the discovery rule incorporates a “duty of diligence” also
4 specifically holds—contrary to Hipple’s arguments—that “[a]rchitects have no general,
5 free-standing duty to comb through public records or to visit project sites in order to police their
6 copyrights.” McTigue, 531 F.3d at 46. Presumably, a sculptor would have no similar duty to
7 scan the internet for all possible photographic infringers simply because her work has been
8 infringed in the past. At the least, on a motion for summary judgment, viewing the evidence in a
9 light most favorable to plaintiff, the Court cannot conclude as a matter of law that he is
10 chargeable with knowledge of Hipple’s alleged infringement on a date certain before his actual
11 discovery of the alleged infringement in 2007. See, e.g., Beidleman v. Random House, Inc., 621
12 F.Supp.2d 1130, 1134 (D.Colo. 2008) (“This is a fact-intensive inquiry, not appropriate for
13 determination on the Defendant's motion for summary judgment.”).

14 **III. CONCLUSION**

15 For all of the foregoing reasons, defendant’s motion for summary judgment is DENIED.

16 DATED this 9th day of August, 2010.

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19 Robert S. Lasnik
20 United States District Judge
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